79-478

IN THE

Supreme Court of the United States

October Term, 1979

THE ALMA SOCIETY, INC., *et al.*,
Petitioners,

v.

IRVING MELLON, *et al.*,
Respondents.

JOINT BRIEF OF RESPONDENTS THE CHILDREN'S AID SOCIETY AND LOUISE WISE SERVICES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Statement

Petitioners seek certiorari on the sole ground that New York, by merely requiring a good cause showing before adoption records are unsealed, consigns them to slavery in violation of the Thirteenth Amendment (Pet., p. 4).

In our view the lack of a substantial federal question in petitioners' claim is fully demonstrated in the opinion below (601 F.2d 1225; Pet., pp. 1a-28a) and the briefs

of the Attorney General and the Jewish Child Care Association, in which we join.

Accordingly, this brief will be limited to additional considerations which require that the petition be denied as without substance in law or in reason.

POINT I

The petition is without substance in law.

Petitioners' basic claim (Pet., pp. 5-6) is that New York's requirement that they show cause before their adoption records are unsealed, causes them constitutionally interdicted harm.[1] Aside from the patent *non sequitur* inherent in the assertion that the mere requirement of showing cause to gain access "leads to psychological trauma," etc., and aside from this Court's comment that "We deal here with issues of unusual delicacy, in an area where . . . restraint is appropriate on the part of the courts . . ." *Smith* v. *Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 855-856 (1977), the simple answer to petitioners' contention was given in *Yesterday's Children* v. *Kennedy,* 569 F.2d 431, 436 (7th Cir. 1977), *reh. denied, cert. denied,* 437 U.S. 904 (1978):

> "Had this Court . . . understood the complaint to be merely objecting to the requirement of a court appear-

1. This basic claim has been rejected, without dissent, by every court that has considered it. *Yesterday's Children* v. *Kennedy,* 569 F.2d 431 (7th Cir. 1977), *reh. denied, cert. denied,* 437 U.S. 904, 98 S. Ct. 3090 (1978); *Alma* v. *Mellon,* 459 F.Supp. 912, 601 F.2d 1225 (2d Cir. 1979); *Application of Maples,* 563 S.W.2d 760 (Mo. 1978) (*en banc*); *Mills* v. *Atlantic City, etc.,* 148 N.J.Super. 302, 372 A.2d 646 (1977); *Matter of Linda F.M.,* 95 Misc.2d 581, 409 N.Y.S.2d 638 (Surr. Ct. Bronx 1978).

> ance . . . it probably would have declined to convene a three-judge court based on the lack of a substantial federal question."

Moreover, petitioners refuse to utilize the remedy New York provides for their supposed ills. Hence, any alleged injury is self-imposed. Indeed, as the New York cases cited by the Court below (Pet., p. 23a) and the unreported cases annexed hereto as Appendix A plainly show, the New York courts have readily granted access on any reasonable showing.

Petitioners' second fundamental contention, that the Thirteenth Amendment, *alone,* abolished all "badges" and "incidents" of slavery, is equally untenable. Not only is this contention inconsistent with the many decisions of this Court vindicating rights, the denial of which were "badges or incidents of slavery" not on Thirteenth Amendment grounds, but on one or more other amendments (Pet., pp. 26a-27a), but also with its decisions vindicating the right to travel as against state interference.

Just as Senator Harlen noted various incidents of slavery, so did Senator Trumbull, another leading proponent of the Thirteenth Amendment and author of the Civil Rights Act of 1866 (*Jones* v. *Mayer Co.,* 392 U.S. 409, 431 (1968)). On his list was included the right to travel:

> "It is idle to say that a man is free who cannot go and come at pleasure . . ." Cong. Globe, 39th Cong., 1st Sess. 43; See also, 1 B. Schwartz, *Statutory History of the United States: Civil Rights* 107 (1970).

Yet, in 1867, when this Court struck down a state tax on interstate travel, it eschewed the "badges of slavery" ground which petitioners' argument would compel. In-

stead, it held the tax "inconsistent with the rights which belong to citizens of other states as members of the Union, and with the objects which that Union was intended to attain," *Crandall* v. *Nevada,* 6 Wall. 35, 49 (1867). Not only was petitioners' "badges of slavery" argument invisible to the Court which lived through the enactment of the Thirteenth Amendment, but it remained so when this Court again rejected state barriers to travel, nearly a century later. See *Edwards* v. *California,* 314 U.S. 160 (1941).

In short, as the Court below noted (Pet., pp. 25a, 27a), this Court has uniformly construed the Thirteenth Amendment narrowly and rejected the sweeping construction for which petitioners contend.

Finally, contrary to petitioners' view, the Thirteenth Amendment plainly addresses only servitude by reason of race. Petitioners' assertion that this cannot be because there were black masters (Pet., p. 23), is another *non sequitur* since the slaves of such masters, like all other slaves, were black.

In any event, this claim was disposed of by this Court when its members were personally familiar with the convulsive events that brought the amendment into being:

> "We repeat, then, in the light of this recapitulation of events, almost too recent to be called history, but which are familiar to us all; and on the most casual examination of the language of these amendments, no one can fail to be impressed with the one pervading purpose found in them all, lying at the foundation of each, and without which none of them would have been even suggested; we mean the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and

> citizen from the oppressions of those who had formerly exercised unlimited dominion over him. It is true that only the fifteenth amendment, in terms, mentions the negro by speaking of his color and his slavery. But it is just as true that each of the other articles was addressed to the grievances of that race, and designed to remedy them as the fifteenth." *Slaughter-House Cases,* 16 Wall. 36, 71-72 (1973).[2]

As with *Crandall* v. *Nevada, supra,* which it cited, this Court, contemporaneously with the Thirteenth Amendment, rejected petitioners' revisionist view of history.

There being not even a claim of racial discrimination in or under the New York statutes, the petition is devoid of substance on this ground as well.

POINT II

The petition is without substance in reason.

In the final analysis, petitioners' entire claim rests on repeated assertions that the modern adoption transaction is indistinguishable from the so-called "second incident of slavery."

Thus, we are instructed that in the selling of a slave child, "the modern adoption transaction was foreshadowed with fearful symmetry" (Pet., p. 13).

Again, that "the second incident of slavery took on contours indistinguishable from the modern adoption transaction" (Pet., pp. 18-19).

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2. See also, Cong. Globe, 39th Cong., 1st Sess., 43, 77; Note 41 to the opinion in *Chapman* v. *Houston Welfare Rights Organization,* —— U.S. ——, 99 S.Ct. 1905, 1918 (1979) shows the continuing vitality of this statement as to the Thirteenth Amendment.

Yet again, that "Twentieth Century adoption laws . . . reinstituted the second incident of slavery" (Pet., p. 19).

This entire argument, we submit, suffers from a fatal case of schizophrenia. Petitioners assert that they do not attack the adoption laws, but only the good cause requirement for disclosure attached thereto (Pet., pp. 5-6, 29). Yet, their claim that the enforced separation of child from parent is an incident of slavery, barred by the Thirteenth Amendment (Pet., pp. 12, 13, 18-19), goes to the very heart and nature of the adoption process itself.

As the Court below observed:

> "It is the New York adoption laws themselves and not the sealed records laws that recognize the divestment by natural parents of their guardianship. . . . it is the adoption laws that create a new parent-child relationship between appellants and their adoption parents. Appellants do not challenge the constitutionality of the adoption laws; thus their challenge to the sealed records laws, even if cognizable under the Thirteenth Amendment in the absence of congressional legislation, is misdirected." (Pet., p. 28a)

Their claim of a false dichotomy (Pet., p. 29), simply misses the point that what they complain of flows from adoption itself rather than from the good cause predicate to disclosure of records.

The true and overwhelming dichotomy actually lies between slavery and adoption. The essence of the slave transaction is that the separation of parent and child is compelled and in total disregard of the child's welfare. Adoption is, in both respects, the polar opposite. It occurs when the parent rejects the child by surrender, abandonment or permanent neglect; the lodestar of the adoption process is

the child's welfare. New York Domestic Relations Law, §§114, 115-b.1.(d)(ii), 115-b.2.(d)(iii),(iv),(v), 116.2, and 116.4; New York Social Services Law, §383.5; see also, *Quilloin* v. *Walcott*, 434 U.S. 246 (1978).

In short, far from being "indistinguishable" from the "second incident" of slavery, adoption is its very antithesis.

Petitioners' arguments, then, boil down to a silly syllogism: Slavery separated parent and child; adoption does likewise; therefore, adoption equals slavery. Such sophomoric reasoning has no place in this Court.

Conclusion

For the reasons set forth above, and those set forth in the briefs of the Attorney General and the Jewish Child Care Association, the petition for certiorari should be denied.

Dated: New York, New York
November 12, 1979.

Respectfully submitted,

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APPENDIX

Appendix A

New York Law Journal, August 13, 1974, p. 12, col. 6 (Surr. Ct. Bronx Co. 1974).

SURROGATE'S COURT

SURROGATE GELFAND

MATTER OF ANN CAROL "S."—Petitioner was adopted pursuant to an order of this court rendered on March 30, 1937. In this proceeding she seeks to unseal the records with reference to said proceeding; to gain access to the records of the New York City Department of Health with reference to her birth record, and to gain access to the records relative to her which are in possession of the authorized agency that placed petitioner for adoption.

Petitioner contends that the relief sought should be granted pursuant to the provisions of Domestic Relations Law section 114 for good cause shown; or, in the alternative, upon the ground that any statutory provisions which prevent an adopted child who has reached majority from examining the records with reference to that child's own adoption is offensive to the equal protection clause of the Fourteenth Amendment of the United States Constitution. By order of this court, the New York City Department of Health, as the custodian of birth records, the authorized agency, and the Attorney General of the State of New York were joined as respondents. The attorney general appeared and reserved his rights on appeal but did not participate in the hearing. The other respondents participated in opposition to the application. The adoptive parents who

otherwise would be necessary parties to this proceeding (DLR sec. 114) are both deceased.

The testimony adduced at the hearing establishes that the petitioner is approximately forty years of age, never married, and has a history of gainful employment throughout her adult life. Until their death, petitioner maintained a normal parent-child relationship with her adoptive parents. Although petitioner testified that she had suspicions that she was an adopted child since her early childhood, this fact was not confirmed to her until she obtained a copy of her amended birth certificate from the New York City Board of Health in December, 1971. At that time petitioner was furnished with a photostat of her full birth certificate which contained the statement "Certificate of Birth. By Adoption." The testimony indicated that since that time petitioner's previously latent concern over whether she had been adopted has heightened to her being preoccupied with an overriding desire to find out the identity of her natural parents. Expert testimony suggests the possibility that this preoccupation has had an adverse impact on the social adjustment of petitioner. Among other suggested ramifications of petitioner's preoccupation with ascertaining her natural parentage the testimony implied that the lack of information on this subject motivated petitioner to terminate an engagement to be married.

Curiosity as to one's forebears, understandable as it may be, if it is mere curiosity, does not fall within the bounds of good cause. In evaluating the sufficiency of good cause, due consideration should be given to the benefit which would accrue to the petitioner as against any possible adverse impact upon any other party. In this case,

the court has examined both its own file, the records of the Department of Health and the records of the authorized agency. The adoptive parents are both deceased. Petitioner has no adoptive siblings, nor does the record indicate the possibility of any natural siblings. The miniscule information contained in the records of the agency and the Department of Health with reference to her parentage would in no way lead to the identity of the petitioner's natural relatives. While petitioner has not succeeded in establishing the strongest case of good cause, she has established that some emotional benefit may accrue to her by revealing to her what little information is available. Upon the facts in this matter this relief can be given to petitioner without it in any way affecting the rights of any living identifiable person.

Accordingly, it is concluded that for good cause shown the records of this court and the New York City Department of Health with reference to petitioner's adoption are unsealed to the extent that they may be inspected by petitioner or her duly authorized counsel. The authorized agency has offered to open its records and furnish all the information in its files with the exception of the identifying data of the petitioner's biological parents. The court's examination of the agency's full file indicates that it contains no information as to the identity of petitioner's biological parents that would not be reflected in the records of the court and the Department of Health. Accordingly, no necessity exists for a direction that the respondent agency open its files to petitioner.

Petitioner having established her right to statutory relief, a determination in this proceeding of the constitutional issue presented is not required.

Settle decree.

SURROGATE'S COURT
OF THE STATE OF NEW YORK

COUNTY OF RICHMOND

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In the Matter of the Application of

B.,

Petitioner,

for Leave to Gain Access to the Sealed Adoption Records pursuant to Section 114 of the Domestic Relations Law.

The petitioner's attorney having requested this Court to amend its decision dated November 13, 1973, for the purpose of clarifying certain provisions thereof, said decision is withdrawn and in place and stead, the following shall constitute the decision of the Court.

Petitioner has applied to this Court for an order permitting her to examine the sealed adoption records of her adoption. The sole grounds alleged for the relief sought was that it was her birthright to know the identity of her natural parents. By decision dated March 7, 1973, the application was denied, because petitioner had not shown "good cause" for the relief sought (*Domestic Relations Law,* 114.).

Petitioner subsequently moved the Court for leave to reopen the proceeding in order that she might have an opportunity to have a hearing at which she could offer proof.

A hearing was held at which Counsel for Petitioner challenged the constitutionality of the statute in question. In addition Petitioner and Dr. —— , her psychiatrist, who had treated her for about a year, testified as to the detrimental effects upon her of not knowing the identity of her natural parents. Expert testimony has been presented on behalf of the Petitioner, which is credited by the Court, that the Petitioner's emotional health will be improved by the receipt of the information she seeks to obtain from the sealed records.

On the basis of all the facts presented, the Court finds that the Petitioner has demonstrated a need for this information, and has shown good cause for the examination of these records. Since Petitioner has shown the good cause required by the statute, the Court does not reach the constitutional questions raised by Petitioner.

The Court directs that the records be opened and that the Petitioner or her attorney be given access to all the records contained in the file, under the supervision of a law assistant designated by the Court.

Submit order.

Dated: December 4, 1973

/s/ FRANK D. PAULO

FRANK D. PAULO, Surrogate

SURROGATE'S COURT

NEW YORK COUNTY
(Midonick, S.)

NOT FOR PUBLICATION

Matter of Adoption of S. [identifying data deleted] also known as [identifying data deleted].

The preliminary unpublished decision prior to the hearing of April 19, 1973, together with the further preliminary decision made upon the record at the hearing of April 19, 1973, also unpublished, all being sealed, are hereby recalled, and in place thereof, the following shall constitute the only decision. This decision is not for publication, and the confidentiality of the record to be inspected is also preserved in that the order shall provide that they shall not be published or disclosed except to petitioner, her attorney, her physicians and psychologists, and those of her children.

Good cause having been demonstrated within the meaning of §114 of the Domestic Relations Law, disclosure or access and inspection shall be granted of the only pertinent records, being those of the licensed agency [identifying data deleted] whose predecessor supervised the foster care and adoption of the petitioner. In view of the serious illness and the need demonstrated by the pediatrician of the adult-petitioner adoptee's ten-year-old child, whose illness is disfiguring and retarding and may be fatal and is undiagnosable and untreatable without natural genetic medical history, we find good cause to make available the entire file of the [identifying data deleted] by affording access

and inspection to the petitioner by her attorney of record. This is in accordance with the adult adoptee's request and authorization. The attorney for the petitioner is authorized to transmit whatever information she may obtain by such disclosure and access and inspection to the petitioner and to her physicians and psychologists and to her infant child's physicians and psychologists. In the usual case the court would shield from disclosure or inspection the identity of the natural parents, even though good cause appears to provide the adoptee with their medical background; but in this case, the adoptee had been given a copy of her original natural birth certificate in Connecticut where she was born, so that she had this information prior to filing the current petition. Cf. Conn. Gen. Stat. Ann., Chap. 778, Section 45-66. It is recommended that the record of petitioner's childhood psychological tests at age two be available through petitioner attorney only for petitioner's physicians or psychologists, in view of the fact that her testing was so early in her life, was within normal limits, and can be so readily misinterpreted by a layman.

To effectuate this decision, petitioner's attorney may submit an order on notice to the [identifying data deleted] directing that the Clerk of the Court hold the records of the [identifying data deleted] for a period of 30 days from entry of such records available to the petitioning adoptee's attorney for access and inspection under the personal supervision of a legal assistant to the Surrogate.

The [identifying data deleted], as the successor licensed adoption agency, has relatively excellent records concerning the natural parents of the adoptee, and has already cooperated generously by a confidential letter to the

adoptee's sick child's pediatrician, at the request of the adoptee and of the court. This letter by [identifying data deleted] summarizes some but not all of the salient medical background of the adoptee's natural mother and of the adoptee, but unnecessarily labels such letter as confidential from the adoptee. The records themselves reveal greater and different medical information of the adoptee and of her natural mother, as well as important medical history of the adoptee's natural siblings. The court takes this occasion to commend [identifying data deleted] for its fine records and help, and to emphasize (1) that after 30 days from the entry of the order, those records will be restored by the Clerk by hand delivery to the confidential files of [identifying data deleted] and (2) that the [identifying data deleted] obligations to the adoptee and her child are now fulfilled, and fully discharged, and that no further interpretations or inquiries or disclosures need be made by that agency; the order shall so provide, and shall provide further that the records of this court, including this decision and the orders based thereon, shall be resealed after this access and inspection.

Submit order accordingly on notice (with a copy of this decision) to the [identifying data deleted].

Dated: May 15, 1973